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No. 02-1609

Supreme Court, U.S.
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In The

Supreme Court of the United States

THE CITY OF LITTLETON, COLORADO,

Petitioner,

v.

Z.J. GIFTS D-4, L.L.C., a Colorado limited liability company, CHRISTAL'S,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals To The Tenth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the requirement of prompt judicial review imposed by *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), entails a prompt judicial determination or a prompt commencement of judicial proceedings.

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STATEMENT OF THE CASE

This Court granted the City of Littleton's Petition for Writ of Certiorari on the issue of whether the procedures for appealing an adverse licensing decision in the Littleton adult entertainment establishment licensing ordinance satisfy the constitutional requirement of "prompt judicial review" established in *Freedman v. Maryland*, 380 U.S. 51 (1965), and applied to an ordinance targeting sexually oriented businesses in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). The Court previously granted *certiorari* on the same issue in *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001), and *Thomas v. Chicago Park District*, 534 U.S. 316 (2002), but did not reach the issue in either case.

A. The Challenged Littleton Ordinance

Section 3-14-2 of the Littleton Municipal Code defines "adult business" to include, *inter alia*, an adult bookstore, adult novelty store, or adult video store which devotes a "substantial or significant" portion of its stock in trade, floor space, or advertising costs to sexually explicit items or receives a significant or substantial portion of its revenues from such items. (Pet. Br. App., at 13a-14a) The terms "significant or substantial," are not defined in the ordinance.

"No person shall conduct an adult business without first having obtained an annual adult business license." L.M.C. 3-14-4(A). (Pet. Br. App., at 23a) The challenged Littleton ordinance, Sections 3-14-5, *et seq.*, sets forth the procedures for approval of adult entertainment establishment licenses by the City Clerk. (Pet. Br. App., at 23a-35a) (References to the record refer to Appellant's Appendix

filed in the Tenth Circuit). In particular, L.M.C., Section 3-14-5 sets forth detailed requirements for a license application. (Pet. Br. App., at 23a-28a) Section 3-14-8(B) of the Code provides for an appeal of the denial of a license to the City Manager. (Pet. Br. App., at 29a-30a) Sections 3-14-11, *et seq.*, delineate the procedures for the suspension or revocation of a license. (Pet. Br. App., at 31a-35a) Sections 3-14-8B(3) and 3-14-11(C)(5) (Pet Br. App., at 30a, 34a) provide that in the event the Littleton City Manager denies, suspends or revokes an adult entertainment license, this "shall be a final decision and may be appealed to the District Court pursuant to Colorado Rules of Civil Procedure (Col.R.Civ.Pro.) 106(A)(4)," which establishes the procedure for judicial review of administrative decisions in Colorado district courts. (Pet. Br. App., at 43a-47a)

B. Statement of the Facts

Respondent Z.J. Gifts D-4, L.L.C. (hereinafter "Z.J."), is a Colorado limited liability company doing business as "Christal's." (R., at 11) Z.J.'s operates its business at 6502 S. Broadway in the City of Littleton, Colorado. (R., at 8-9) Petitioner, the City of Littleton, Colorado (hereinafter "the City"), is a home-rule municipal corporation organized under the laws of the State of Colorado. (R., at 63) Z.J.'s business is located in a "B-2" zoned district, which permits the operation of retail businesses. (R., at 11)

Z.J.'s business sells lingerie, novelty items, greeting cards, cosmetics, oils and lotions, videocassette tapes, dvd's, and publications. (R., at 9-10) A portion of Z.J.'s stock-in-trade is sexually explicit in nature, which material is presumptively protected by the First and Fourteenth

Amendments to the United States Constitution, and Article II, Section 10 of the Colorado Constitution.

Prior to opening its business, Z.J. received a letter dated July 28, 1999 from Denise D. Naegle, Director of Community Development for the City of Littleton, indicating that the City had received "many comments" from citizens who were concerned that Z.J. intended to operate "a bookstore catering to the adult entertainment industry" and advising that adult uses were not permitted at this location. (R., at 448) City officials made also statements they consider Z.J.'s business to be an "adult entertainment establishment." (R., at 450) The City later denied Z.J.'s sales tax license application on the basis that the City determined Z.J. operated an adult business in an improper zone district. (R., at 450) Z.J., however, has never intended to operate an "adult entertainment establishment" at its location in Littleton, Colorado and has sought to obtain guidance from the City as to how to comply with the ordinance. None has been forthcoming.

Chapter 14 of the Littleton Municipal Code regulates "adult entertainment establishments" in the City of Littleton, Colorado. (R., at 30-52) Section 3-14-2 of the Code defines "adult business" to include, *inter alia*, an adult bookstore, adult novelty store, or adult video store which carries as a "substantial or significant" portion of its stock-in-trade sexually explicit items. (R., at 31) Section 3-14-3 imposes zoning restrictions on adult entertainment establishments, and provides that such businesses may only operate in industrial zoned districts. (R., at 36) No adult businesses have operated in the City of Littleton, Colorado since at least 1990. (R., at 208, l. 21-22)

Jon Payne, Senior Planning and Zoning Official for the City of Littleton, was unable to articulate any definition for the terms "substantial and significant" in the definition of adult bookstore at his deposition.[1] (R., at 460-461) Denise Naegle defined the terms "substantial and significant" to mean "an important use in the business." (R., at 464) She could not place any percentage or number on these terms.[2] (R., at 467) Based upon her interpretation,

[1] The following is an excerpt of Mr. Payne's deposition in the record:

Q. Now you have indicated you are involved with the enforcement of Littleton's zoning ordinances, is that correct?

A. Yes.

Q. And you've been doing that since 1973?

A. Actually, since 1995.

Q. And what is the city's interpretation or what do the terms "substantial and significant" mean within the Littleton ordinances?

A. Well, it would be something that a very – hmm. I have to think about that. I believe it's something that is – (pause.) I don't know that I can come up with a good definition of that.

(R., at 460, l. 13-461, l. 2)

[2] The following is an excerpt from Ms. Naegle's deposition in the record:

Q. What percentage would not be a significant or substantial portion of its stock in trade or interior floor space?

A. I couldn't say. It would depend.

Q. What would it depend on?

A. You know, I am not certain. I would have to think about it and do some research. I would probably want to know volume of sales and things like that. But I don't know. I can't say for certain.

Q. And you indicated before that in your opinion significant" meant an important part of the business?

A. Uh-huh.

(Continued on following page)

Ms. Naegle determined Z.J.'s business to be an adult business subject to the City's adult entertainment establishment licensing requirement. (R., at 464)

In three other places in the Littleton Municipal Code, the adjective "substantial" is used to modify the words "improvement" or "damage" as "50% of the market value of the structure" before improvement or damage to the property in the context of vested rights or flood plain regulation. *See,* L.M.C., Section 10-6-2, definitions relating to the flood plain ordinance, and Section 10-13-4, relating to vested property rights. (Resp. App., at 13-14)

C. Proceedings in the Courts Below

Federal Court.

On August 26, 1999, Z.J. brought the instant action pursuant to 42 U.S.C. Section 1983, challenging on numerous grounds the constitutionality of the Littleton adult entertainment establishment licensing ordinance, L.M.C., Sections 3-14-1, *et seq*. The parties filed cross motions for summary judgment. (R., at 70-115, 373-422) After hearing oral arguments, the district court upheld the Littleton

Q. And could you translate that into any kind of percentage of revenues?

A. No, I couldn't.

(R., at 467, l. 9-24)

ordinance in all respects on March 31, 2001. (Pet. App., at 40-67) The district court rejected all of Z.J.'s constitutional challenges to the Littleton ordinance, and further determined Z.J. clearly operated "an adult entertainment business as defined in Chapter 14 of the Littleton Municipal Code." The district court found that thirty-three percent adult material constitutes a significant or substantial portion of the store's inventory.

Z.J. appealed the district court order. The United States Court of Appeals for the Tenth Circuit affirmed in part and reversed in part. (Pet. App., at 1-39) More particularly, after hearing oral arguments in the case, the Tenth Circuit ordered supplemental briefs on the issues of standing and abstention under *Younger v. Harris*, 401 U.S. 37 (1971). In the supplemental briefs, the Tenth Circuit was advised of state court criminal and nuisance actions brought by the City against Z.J. *See* discussion, *infra*.

The Tenth Circuit determined that the City "explicitly waived" the issue of abstention under *Younger v. Harris*, 401 U.S. 37. (Pet. App., at 9, n. 4) The Court of Appeals found that Z.J. did not have standing to challenge the civil disability provisions or the suspension and revocation provisions of the Littleton ordinance. (Pet. App., at 11) *See, Essence Inc, v. City of Federal Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002), *cert. denied*, 537 U.S. 947 (2002). The panel went on to find that Z.J. did not have standing to challenge the terms "substantial or significant" on vagueness grounds. (Pet. App., at 12-14) The Tenth Circuit determined that these terms were readily susceptible to a narrowing construction by state courts and suggested that a common method has been to develop a percentage that will act as a guide as to what constitutes substantial and

significant. Z.J.'s challenge to a 21 year old age restriction was found to be moot. (Pet. App., at 14-15)

The Tenth Circuit then discussed in detail the opinions in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), and found the requirements of obtaining fingerprinting and a zoning certificate prior to obtaining an adult entertainment license were "unconstitutional for failure to specify a time limit within which the City must act." (Pet. App., at 20-24) The Court upheld a requirement that a sales tax license be obtained from the City prior to obtaining an adult entertainment establishment license. (Pet. App., at 21) Z.J. filed a petition for panel rehearing on this issue, which petition was denied. (Pet. App., at 68-69)

The Tenth Circuit then addressed the issue of prompt judicial review and, after reviewing the case law from the Supreme Court and other circuits on this issue, determined that "prompt judicial review" required a prompt judicial determination. The Court of Appeals examined the language of Justice O'Connor's plurality opinion in *FW/PBS* in detail and determined it did not "necessarily indicate any intent to weaken the second *Freedman* requirement" which the plurality opinion had characterized as "essential." (Pet. App., at 27-28) Since "parties always have *access* to the courts" and "without a decision, the most exhaustive review is worthless," *quoting Baby Tam v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998) (emphasis in original), the Tenth Circuit concluded that Justice O'Connor's plurality opinion's "'avenue for prompt judicial review' requirement makes far more sense if it is understood to mean a prompt final judicial determination." (Pet. App., at 28) The panel stated, "[i]f Justice O'Connor had intended to adopt a different judicial review

requirement [from *Freedman*] for licensing cases, she could have done so explicitly, just as she explicitly rejected the burden-shifting requirement." (Pet. App., at 30) The panel recognized that the Fourth, Sixth, and Ninth Circuit had previously determined that Justice O'Connor's plurality opinion in *FW/PBS* "gave no indication that she was modifying the second requirement of prompt judicial review." *Nightclubs Inc. v. City of Paducah*, 202 F.3d 884, 893 (6th Cir. 2000); *See also*, *Baby Tam*, 154 F.3d at 1102; *11126 Baltimore Boulevard v. Prince George's County*, 58 F.3d 988, 999 (4th Cir. 1995) (*en banc*), *cert. denied*, 516 U.S. 1010 (1995). (Pet. App., at 30-31)

The Tenth Circuit also recognized that the decision in *Thomas v. Chicago Park District*, 534 U.S. 316, n. 2 (2002), had specifically distinguished the ordinance struck down in *FW/PBS* from a content neutral licensing scheme because it targeted "businesses purveying sexually explicit speech." (Pet. App., at 31) Based upon the focus on the content of the "controversial" speech in the Littleton ordinance, the Court of Appeals concluded "the danger that an ordinance like Littleton's may be improperly used as a subterfuge for censorship is too great to overlook the necessity for a prompt judicial determination." (Pet. App., at 31)

Because the procedure provided in the Littleton ordinance, Colorado Rules of Civil Procedure 106(a)(4), "does not assure that license decisions will be given expedited review," the Littleton ordinance was determined to be unconstitutional. (Pet. App., at 32) Finally, the panel upheld the City's location restrictions on adult entertainment establishments. (Pet. App., at 33-38)

The City filed a petition for rehearing en banc that was denied. (Pet. App., at 68-69) Z.J. also filed a petition for rehearing that was denied. The City filed the petition for certiorari in this case that was granted on October 14, 2003.

State Court.

During the pendency of this case in federal court, the City initiated actions in state court to enforce the challenged ordinance. The City filed 2,620 separate charges in the Littleton Municipal Court involving alleged licensing and zoning violations against both Respondent Z.J. and its president, Ross Jackson. (Supplemental Brief of Plaintiff-Appellant, 10th Circuit, filed July 2, 2002, Exhibit E) Each municipal court violation carries a sentence of up to one year in jail and/or a $1000 fine. (R., at p. 414) These municipal court violations remain pending subject to interlocutory appeals by both sides.

In addition, Z.J. was convicted in the Littleton Municipal Court on 759 counts of various sales tax code violations and fined $62,325. These convictions were affirmed by the Arapahoe County District Court on October 24, 2002. The Colorado Supreme Court granted Z.J.'s petition for certiorari on June 2, 2003. *Z.J Gifts D-4, L.L.C. v. City of Littleton*, 2003 WL 21260833 (2003).

The City also brought a civil nuisance action against Z.J. in the Arapahoe County District Court on January 18, 2000. (Supplemental Brief of Plaintiff-Appellant, 10th Circuit, Exhibit A) The City obtained an order enjoining the operation of Z.J.'s business that was based upon the district court's opinion in the federal case on August 24, 2001. (Supplemental Brief of Plaintiff-Appellant, Exhibit

B) Z.J. filed a motion for stay pending appeal on September 28, 2001, which motion was denied by the district court on December 27, 2001 "nunc pro tunc to the 14th day of December, 2001." (Resp. App., at 1) On January 28, 2002, the City was unsuccessful in attempting to enforce this order through a contempt citation in the Arapahoe County District Court, which stated that there is "evidence indicating things have changed and that there are significantly less items of an adult nature being sold." (Supplemental Brief of Plaintiff-Appellant, Exhibit C, p. 64, l. 3-4) The injunction order was later reversed by the Colorado Court of Appeals in an unpublished opinion on February 20, 2003. (Resp. App., at 2-12)

SUMMARY OF THE ARGUMENT

The "essential" requirement of prompt judicial review imposed by *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), entails a prompt judicial determination in order to obviate the dangers of censorship inherent in a system of licensing speech. Mere commencement of a judicial proceeding has no importance if a license applicant does not get an assurance of prompt judicial participation that results in a determination on the merits. "Parties always have *access* to courts." *Z.J. Gifts D-4, L.L.C. v. City of Littleton* (Pet. App., at 20) If the second "essential" *Freedman* requirement of "prompt judicial review," is reduced to the ability to file a case in court, it will be rendered meaningless. Then, only the first *Freedman* safeguard will retain any significance for licensing laws that target businesses based upon the content of the expression they distribute, and the core policy of Freedman of preventing delay will be greatly undermined.

Under the challenged ordinance, there exists no guarantee that any adult business will operate while any judicial licensing proceedings are pending even before the trial court, nor is there any guarantee that any judicial review that might be available (either in the trial court or on direct appeal) "will be required in the shortest fixed period compatible with sound judicial resolution." *Freedman*, 380 U.S. at 39. Without such an express constitutional guarantee, trial courts (often unconsciously due to docket pressures) will be hard pressed to take action to disturb "the status quo of silence" imposed upon a business seeking government permission to present protected expression. *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 286 (2001). "Even if that [party] is willing and able to litigate the case successfully, the eventual relief may be 'too little and too late.'" *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758 (1988), *quoting Freedman*, 380 U.S., at 57. Limiting the judicial review requirement of *FW/PBS* to prompt commencement of judicial proceedings does not satisfy "[t]he core policy underlying *Freedman* . . . , because undue delay results in the unconstitutional suppression of protected speech." *FW/PBS*, 493 U.S., at 228.

The City alleges that Z.J. operates an adult video store as defined in the Littleton Municipal Code as devoting a "substantial or significant" amount of its inventory, or floor space as specifically defined adult material. This is not just a ministerial decision but rather involves the appraisal of facts and the exercise of judgment. City officials are unwilling or unable to articulate any objective measure of what this means. As such, the determination of substantial or significant is not just a ministerial task but

involves the actual determination concerning an unspecified amount of speech material of a particular content.

The Court has consistently required that objective standards control licensing decisions so that the process is transparent and can be effectively reviewed by a court. "Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable expression." *City of Lakewood*, 486 U.S. at 758.

Here, the Littleton definitions provide no guideposts, nor do city officials even attempt to offer any guideposts to assist a business seeking to comply with the ordinance or to a court reviewing licensing decisions to determine if the licensor is suppressing a particular point of view. This case offers a clear example of how a supposedly "content neutral" licensing ordinance may be used as a means to suppress disfavored speech. The City's assertion that this argument was not raised is not supported by the record where Z.J. raised the issue of overbroad discretion at every stage of the case.

In *Thomas v. Chicago Park District*, 534 U.S. 316, 322, and n. 2, the Court distinguished the ordinance struck down in *FW/PBS* from "a content neutral permit scheme regulating speech in a public forum" since "it involved a licensing scheme that targets businesses purveying sexually explicit speech." The Littleton licensing ordinance can be distinguished from content neutral licensing laws

for the same reason. As such, the City's pleas that the licensing ordinance be evaluated as a content neutral time, place and manner restriction under an intermediate level of scrutiny should be rejected.

Contrary to the protests of the City, it is *not* impossible, or even particularly difficult to meet constitutional requirements to protect against the suppression of expression. As stated by the Court, "we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988).

The Tenth Circuit upheld many provisions of the Littleton ordinances that more directly address the adverse external secondary effects of adult entertainment establishments. The most important of these is the locational restriction that banishes such businesses to less than 1% of the total land area of Littleton within limited areas in industrial zoned areas. Without a licensing requirement, the City of Littleton has numerous tools with which to regulate these businesses. The City can also enforce laws of general application against any business, including bookstores, selling any type of material, and obtain a closure in the case of violations of Littleton health and safety regulations. In addition, the City remains free to enforce any criminal laws in the event that actual crimes occur in or around such businesses, and close such businesses if they constitute a public nuisance. *See, Arcara v. Cloud Books, Inc.* 478 U.S. 697 (1986).

ARGUMENT

I. BY FAILING TO PROVIDE FOR A SPECIFIC TIME PERIOD FOR PROMPT JUDICIAL DETERMINATION OF LICENSING DECISIONS, THE LITTLETON ADULT ENTERTAINMENT ESTABLISHMENT ORDINANCE CREATES AN INVALID PRIOR RESTRAINT THAT RESULTS IN COMPELLED SILENCE WHILE JUDICIAL REVIEW CONTINUES FOR AN UNSPECIFIED PERIOD OF TIME

A. The Requirement of a License to Operate a Business Providing Protected Speech Operates as a Prior Restraint on Expression and is Presumptively Unconstitutional

The First Amendment's guarantee of free speech prohibits a wide assortment of government limitations on expression:

> but the core abuse against which it was directed was the scheme of licensing laws implemented by the monarch and Parliament to contain the "evils" of the printing press in 16th- and 17-century England. The Printing Act of 1662 had "prescribed what could be printed, who could print, and who could sell." Mayton, *Toward a Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 Cornell L.Rev. 245, 248 (1982). It punished the publication of any book or pamphlet without a license and required that all works be submitted for approval to a government official, who wielded broad authority to suppress works that he found to be heretical, seditious, schismatical, or offensive.

Thomas v. Chicago Park District, 534 U.S., at 778-779, *quoting*, F. Siebert, Freedom of the Press in England, 1476-1776, p. 240 (1952). At least two licensors lost their positions for licensing books that were apparently controversial. F. Siebert, Freedom of the Press in England, 1476-1776, p. 244 (1965).

The Printing Act of 1662 included restrictions on the retail sales of publications.

> In addition to defining who could print and who could import books, the Act of 1662 set definite restrictions on the retail sale of printed books. Booksellers were limited to members of the Stationers Company and to those persons specially licensed by the Lord Bishop of the diocese in which the retailer resided. All "haberdashers of small wares, ironmongers, chandlers, and shopkeepers' were specifically prohibited from engaging in the book trade. An exception was made in the case of the shopkeepers in and about Westminster Hall who had been in business before 1661."

Id., at 240. The Printing Act of 1662 also authorized general search warrants for the seizure of books and papers. *Id.*, at 253-54.

"The English licensing system expired at the end of the 17th century, but the memory of its abuses was still vivid enough in colonial times that Blackstone warned against the 'restrictive power' of such a 'licenser' – an administrative official who enjoyed unconfined authority to pass judgment on the content of speech. 4 W. Blackstone, Commentaries on the Laws of England 152 (1769)." *Thomas v. Chicago Park District*, 534 U.S., at 779.

This Court has always applied the strictest level of scrutiny to any law requiring a license to engage in speech

activity. In *Lovell v. City of Griffin*, 303 U.S. 444, 451-52 (1938), the Court recognized that "[t]he struggle for the freedom of the press was primarily directed against the power from the licensor."

> [T]he liberty of the press became initially a right to publish without a license what formerly could be published only with one. While this freedom from previous restraint upon publication cannot be regarded as exhausting the guaranty of liberty, the prevention of that restraint was a leading purpose in the adoption of the constitutional provision.

Id., at 451-452.

In *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969), the Court referred to "the prior restraint of a license," recognizing that all laws subjecting the exercise of First Amendment freedoms to a prior license requirement act as prior restraints. Although the mere fact that licensing requirements constitute prior restraints does not make them *per se* unconstitutional, in a long line of decisions implementing the Framers' basic hostility to laws licensing speech, the Court has repeatedly stricken the overwhelming majority of such laws, applying a heightened level of scrutiny.[3]

[3] *See e.g., Hague v. C.I.O.*, 307 U.S. 496 (1939) (permit needed to lease a hall for a public meeting involving advocacy of obstruction of the government); *Schneider v. State*, 308 U.S. 147 (1939) (permit needed to distribute handbills on public streets or sidewalks); *Cantwell v. Connecticut*, 310 U.S. 216 (1940) (permit needed for charitable or religious solicitations); *Largent v. Texas*, 318 U.S. 418 (1943) (permit needed for sale of books or tracts); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (licenses tax for selling door to door stricken as applied to Jehovah's Witnesses engaging in First Amendment activity); *Saia v.*

(Continued on following page)

The United States Supreme Court has vigorously and repeatedly condemned any system of prior restraint of First Amendment rights. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (injunction); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66-67 (1989) (pretrial seizure under RICO statute). The constitutional protection against prior restraints is so exalted that "a person faced with such an unconstitutional licensing law may ignore it and may engage with impunity in the exercise of the right of free expression for which the law purports to require a license." *Shuttlesworth*, 394 U.S. at 151.

In determining the existence of an impermissible prior restraint, courts must begin with the premise that: "Any system of prior restraint . . . comes to this Court bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (*quoted* in *Vance v. Universal Amusements*, 445 U.S. 308, 317 (1980); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. at 225. *See also, Bantam Books, Inc. v. Sullivan*, 372 U.S.

New York, 334 U.S. 558 (1948) (permit needed to sound amplification devices); *Kunz v. New York*, 340 U.S. 290 (1951) (permit needed to hold public worship meetings on streets); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 496 (1952) (permit required for exhibition of motion picture films); *Gelling v. Texas*, 343 U.S. 960 (1952) (permit required for exhibiting motion picture films); *Staub v. City of Baxley*, 355 U.S. 313 (1958) (permit needed to solicit members for an organization); *Cox v. Louisiana*, 379 U.S. 536 (1965); *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968) (films could only be exhibited to minors if first permitted by a board of censors); *Shuttlesworth*, 394 U.S. 147 (parade permit); *Secretary of State v. J.H. Munson Co.*, 467 U.S. 947 (1984); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (annual permit needed to operate any news rack on public sidewalks).

58, 70 (1962); *New York Times v. United States*, 403 U.S. 713, 714 (1971).

The presumption against prior restraints is heavier – and the degree of protection broader – than that against limits on expression imposed by criminal penalties. Underlying the distinction is a principle strongly rooted in our law:

> *[A] free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand.* It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable. *See Speiser v. Randall*, 357 U.S. 513, 2 L.Ed.2d 1460, 78 S.Ct. 1332 (1958).

Southeastern Promotions, Ltd., 420 U.S. at 558-559 (emphasis in original). *See also, Vance*, 445 U.S. at 525-26.

Since the instant case involves a regulation that requires persons to obtain a license to present protected speech prior to its expression, these cases make it clear that "a heavy presumption" exists against the constitutional validity of the Littleton adult entertainment establishment licensing ordinance.

B. *Freedman v. Maryland*, 380 U.S. 51 (1965), Made Clear That Prompt Judicial Determination Was a Constitutionally Required Procedural Safeguard Necessary to Obviate the Dangers of a Licensing System

"The settled rule is that a system of prior restraint 'avoids constitutional infirmity only if it takes place under

procedural safeguards designed to obviate the dangers of a censorship system.'" *Southeastern Promotions, Ltd.*, 420 U.S. at 558, *quoting Freedman v. Maryland*, 380 U.S., at 57.

In *Freedman v. Maryland*, 380 U.S., at 57, this Court held that a law requiring the submission of films for approval by a government board that lacks certain procedural safeguards "contains the same vice as a statute delegating excessive administrative discretion." In *Freedman*, Maryland had created a licensing board empowered to deny licenses for the exhibition of motion picture films that were obscene, or "tend . . . to debase or corrupt morals or incite to crimes." *Id.*, at 52, n. 2. The statute provided the applicant "the right of appeal" to the Baltimore City Court with "a further right of appeal" to the Court of Appeals of Maryland. *Id.*, at 55. The Court focused on the petitioner's argument that the board's decision "without any judicial participation, effectively bars exhibition of any disapproved film, unless and until the exhibitor undertakes a time consuming appeal to the Maryland courts and succeeds in having the Board's decision reversed." *Id.*, at 54-55.

The Court determined:

> There is no statutory provision for judicial participation in the procedure which bars a film, nor even assurance of prompt judicial review. Risk of delay is built into the Maryland procedure, as is borne out by experience; in the only reported case indicating the length of time required to complete an appeal, the initial judicial determination has taken four months and final vindication of the film on appellate review, six months. *United*

Artists Corp. v. Maryland State Board of Censors, 210 Md. 586, 124 A.2d 292 [1956].

Id., at 55.

The Court recognized that an administrative official would be less sensitive to the First Amendment interests than a detached judicial officer. "Because a censor's business is to censor, there inheres the danger that he may well be less responsive than a court – part of an independent branch of government – to the constitutionally protected interests of free expression. And if made unduly onerous by reason of delay or otherwise, to seek *judicial review*, the censor's determination may in practice be final." *Id.*, at 57-58 (footnote omitted and emphasis added). *See also*, *Thomas v. Chicago Park District*, 534 U.S. 316 ["[a] licensing body likely will overestimate the dangers of controversial speech when determining, without regard to the film's actual effect on the audience, whether the speech is likely 'to incite' or 'corrupt the morals' "], *quoting Freedman*, at 52-53, n. 2.

Thus, the Court made it clear that actual judicial participation was necessary before a final restraint on protected expression could be imposed:

> The teaching of our cases is that, because only *a judicial determination* in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring *a judicial determination* suffices to impose a valid final restraint. . . . Any restraint imposed in advance of *a final judicial determination on the merits* must similarly be limited to preservation of the status quo for the shortest fixed period compatible with *sound judicial resolution*. . . . [T]he procedure must also assure *a prompt judicial decision*, to minimize the deterrent effect of an interim and possibly erroneous denial of a license. Without these safeguards it may prove to burdensome to seek *review* of the censor's determination.

Id., at 58-59 (emphasis added, citations and footnotes omitted).

The Court found the Maryland procedures for judicial review were unconstitutional for three distinct reasons. First, "the burden of instituting judicial proceedings and of persuading the court that the film is protected expression" rests on the exhibitor. *Id.*, at 60. Second, "exhibition is prohibited pending judicial review, however protracted." *Id.* "Third, it is abundantly clear that the Maryland statute provides no assurance of prompt judicial determination." *Id.*

While *Freedman* repeatedly used the terms judicial "review," "participation," "determination," "resolution," and "decision" interchangeably, the terms "commencement" of judicial proceedings or "access" to judicial review were not mentioned anywhere in the opinion. The fact that the Maryland statute specifically provided "the right of appeal" was not adequate to save the statute. *Freedman* was unambiguous that judicial review meant judicial determination.

C. Subsequent Decisions, Including *FW/PBS, Inc. v. City of Dallas*, Have Not Relaxed *Freedman*'s Essential Requirement of Prompt Judicial Determination

Although the licensing scheme in *Freedman* required the prior submission of individual films to a board of

censors for pre-exhibition approval, the Supreme Court's subsequent opinions have made clear that *Freedman's* procedural safeguards apply not only whenever a presumptively protected publication or film is subjected to the prior restraint of a license requirement, but, indeed, whenever a First Amendment business is subject to the requirement of obtaining a license prior to presenting expression.[4] Moreover, a review of the prior restraint cases following *Freedman* does not give any indication that the explicit *Freedman* requirements relating to "prompt judicial review" would be relaxed to be satisfied by the mere commencement of judicial proceedings.

The Supreme Court in *Shuttlesworth v. City of Birmingham,* 394 U.S. 147, recognized that the swift judicial review requirement would apply to the discretionary parade permit challenged in that case. Prior to striking down convictions for failure to obtain a parade permit based upon the application of the law by city officials, the Court assumed that the Alabama Supreme Court's narrowing construction rendered the Birmingham ordinance constitutional on its face. However, the Court noted that "the validity of this assumption would depend upon . . . the availability of expeditious judicial review of the Commission's refusal of a permit." *Id.*, at 155, n. 4, *citing Freedman, quoted* in *FW/PBS, Inc. v. City of Dallas*, 493 U.S., at 228. In his concurring opinion, Justice Harlan explicitly

[4] *See e.g., Roaden v. Kentucky*, 413 U.S. 496, 504 (1973) [stating that a bookstore is "presumptively under the protection of the first Amendment"]; *Smith v. California*, 361 U.S. 147, 150 (1959) ["certainly a retail bookseller plays a most significant role in the process of the distribution of books."]

stated, "nor did the State of Alabama provide for a speedy court review of the denial of a parade permit" because under the *mandamus* procedure provided, the "state court is not obliged to render a decision within any fixed period of time." *Id.*, at 161, n. 3 (Harlan, J. concurring).

Southeastern Promotions, Ltd v. Conrad, 420 U.S. 546, held that denial of municipal facilities for a production of a play constituted an improper prior restraint for failure to provide *Freedman* procedural safeguards. The "system did not provide a procedure for prompt judicial review." *Id.*, at 561. Although the trial court heard the petitioner's motion for preliminary injunction within a few days (which motion was denied), "effective review on the merits was not obtained until more than five months later." *Id.*, at 562. The Court concluded that "[t]he procedural shortcomings that form the basis for our decision are unrelated to the standard that the board applied. . . . The standard, whatever it may be, must be implemented under a system that assures prompt judicial review with a minimal restriction of First Amendment rights necessary under the circumstances." *Id.*

In *National Socialist Party v. Skokie*, 432 U.S. 43, 44 (1977) (*per curiam*), the Court entered a stay of an injunction against marching and displaying swastikas where appellate review could take over a year to complete. "If a State seeks to impose a restraint of this kind, it must provide strict procedural safeguards, including immediate appellate review. Absent such review, the State must instead allow a stay." *Id.* (citations omitted), cited in *FW/PBS, Inc, v. City of Dallas*, 493 U.S. at 228.

The Court struck down a discretionary licensing scheme for newsracks on public property in *City of Lakewood v. Plain Dealer Association*, 486 U.S. 750, 758 (1988). In discussing the ability of the newspaper to bring a facial constitutional challenge to the ordinance, the Court acknowledged that, in the absence of an actual judicial determination, speech rights could be extinguished under the licensing scheme. "Until a judicial decree to the contrary, the licensor's prohibition stands. In the interim, opportunities for speech are irretrievably lost." *Id.*, *citing Freedman*, 380 U.S. at 57.

The same term, in *Riley v. National Federal of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), the Supreme Court held the procedural safeguards of *Freedman* applied to a content-neutral licensing requirement for professional fundraisers. The licensing requirement was unconstitutional because the ordinance did not "on its face . . . purport to [limit the time period within which] a determination must be made [by the licensor]." *Id.*, at 802. The Court recognized the constitutional significance of the state's previous practice of allowing fundraisers to solicit as soon as their applications were filed. "Then, delay permitted the speaker's speech; now, delay compels the speaker's silence." *Id.*

Following this consistent line of cases, the Court in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, determined that certain *Freedman* safeguards applied to a licensing ordinance targeting sexually oriented businesses. The Court, in Justice O'Connor's plurality opinion, identified the three procedural safeguards required by *Freedman:* "'(1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of

that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.'" *Id.*, at 227. The plurality opinion held that the first two of the three *Freedman* procedural safeguards were mandated where a licensing requirement was placed on sexually oriented businesses.

> The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained and there must be the possibility of prompt judicial review in the event that the license is erroneously denied. *See Freedman supra*, at 51, 13 L.Ed.2d 649, 85 S. Ct. 734. *See also Shuttlesworth [v. City of Birmingham]*, 394 U.S. [147], at 155, n.4, 22 L.Ed.2d 162, 89 S.Ct. 935 [(1969)] (content-neutral time, place, and manner regulation must provide for "expeditious judicial review"); *National Socialist Party of America v. Skokie*, 432 U.S. 43, 53 L.Ed.2d 96, 97 S. Ct. 2205 (1977).
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> * * *
>
> [T]he Dallas scheme does not provide for an effective limitation on the time within which the licensor's decision must be made. It also fails to provide an avenue for prompt judicial review so as to minimize suppression of the speech in the event of a license denial. We therefore hold that the failure to provide these essential safeguards

> renders the ordinance's licensing requirements unconstitutional insofar as it is enforced against those businesses engaged in First Amendment activity, as determined by the Court on remand.

Id., at 228-229.

Justice O'Connor's plurality opinion determined the third *Freedman* safeguard was not as "essential" in this context and would not apply. Thus, the third *Freedman* safeguard would not apply because, unlike *Freedman*, the licensing system was not "direct censorship of particular expressive material." *Id.*, at 229. "Under the Dallas ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the City reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *Id.*

Section II.B of the plurality opinion stressed the need for "prompt" and "expeditious" judicial review by repeating these terms no less than five times when referring to the "essential" (mentioned twice) safeguard of judicial review. *Id.*, at 228, 229. As noted in the en banc Fourth Circuit decision in *Baltimore Boulevard*, 58 F.3d at 1000, "Justice O'Connor's decision in *FW/PBS* cannot be properly read to relax the *Freedman* prompt judicial review requirement. . . . " The Tenth Circuit's careful analysis of the language used in the plurality opinion in the opinion below, examined the use of the words "possibility," "availability," and "avenue" of judicial review, and concluded that language "most likely amounts to an acknowledgment that it is up to the plaintiff to decide whether or not to seek judicial review. This language does not necessarily indicate any intent to weaken the second *Freedman* requirement." (Pet. App., at 28)

It is fundamental that the doors of the courthouse are open to all persons. "Parties always have *access* to courts." (Pet. App., at 28) (emphasis in original). As recognized in Justice White's dissenting opinion in *FW/PBS*, "no one suggests that licensing decisions are not subject to immediate appeal to the courts." *FW/PBS*, 493 U.S. at 248 (White, J. dissenting). Mere commencement of a judicial proceeding has no importance if a license applicant does not get an assurance of prompt judicial participation that results in a determination on the merits. If the second *Freedman* requirement of "prompt judicial review," twice identified in Justice O'Connor's *FW/PBS* plurality opinion as an "essential safeguard" to protect free speech, *Id.*, at 228, is reduced to the ability to file a case in court, it will be rendered meaningless. Then, only the first *Freedman* safeguard will retain any significance for licensing laws that target businesses based upon the content of the expression they distribute.

The City asserts that the challenged licensing ordinance is not a censorship since it involves no exercise of discretion by a licensing official, but rather only mundane ministerial decisions. However, this assertion is seriously undercut by an examination of the criteria (or lack thereof) used to make the basic decision as to whether a business qualifies as an adult entertainment establishment that requires a special license to present protected speech. The City alleges that Z.J. operates an adult video store as defined in the Littleton Municipal Code as devoting a "substantial or significant" amount of its inventory or floor space to specifically defined adult material. This is not a mundane ministerial decision but rather involves the appraisal of facts and the exercise of judgment. As discussed in detail, *infra*, City officials are unwilling or

unable to articulate any objective measure of what this means. As such, the determination of substantial or significant is not merely a ministerial task and does involve the actual determination of the content of speech material. Indeed, it presents exactly the type of licensing scheme that carries with it the strong possibility of suppression of disfavored expression.

D. The Littleton Adult Business Licensing Ordinance Lacks the Requisite Procedural Safeguards

As in *FW/PBS*, the Littleton Ordinance "fails to provide an avenue for *prompt judicial review* so as to minimize suppression of speech in the event of a license denial." *Id.* While L.M.C., Sections 3-14-8(B)(3) and 3-14-11(C)(5) (Pet. Br. App., at 28a, 34a), in conjunction with Colo. R. Civ. Pro. 106(a)(4) (Pet. Br. App., at 44a-45a), establish a mechanism for an appeal of the denial, suspension or revocation of a license, these enactments in no way require: (1) an assurance that any interim restraint imposed pending judicial resolution on the merits will be of brief duration; and (2) a guarantee of swift final judicial action. The burden of initiating any judicial review rests on the shoulders of a person seeking to present protected expression.

Under the Littleton ordinance, there is no "assurance of prompt judicial review." The City Clerk has thirty (30) days to make an initial determination on a license followed by a hearing before the City Manager that can take up to an additional sixty (60) days (ten days for appeal, thirty days for a hearing, twenty days for a decision) before a decision. *See*, L.M.C., Section 3-14-8(B) (Pet. Br. App., at 29a-30a) Pursuant to Colo. R. Civ. Pro. 106(a)(4)(III), the

district court must order the administrative body to prepare the record for review on a specified date, which shall be after the date upon which the answer must be filed. (Pet. Br. App., at 45a) There is no specified period in which the district court must enter this order, nor is there any specific time period set forth in Rule 106 concerning the time in which the record must be filed. In the experience of undersigned counsel, it can take up to thirty (30) days or longer before the district court even signs the order certifying the record, due to the press of court business. Once the order certifying the record is entered, it can often take up to 120 days before the record is finally prepared.

Rule 106(a)(4)(IV), Colo. R. Civ. Pro., then provides for a briefing schedule of eighty-five (85) days after date the record is filed (Pet. Br. App., at 45a), not including common additional periods for mailing and extensions of time. Once all briefs are filed, there is no specific period in which the district court is required to issue a ruling. Moreover, unlike the Memphis procedure struck down in *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995), judicial review brought pursuant to Colo. R. Civ. Pro. 106 does *not* take "precedence over other litigation." Thus, from the beginning of the licensing process, it may take 325 days or longer before the matter is before a court for a final judicial decision. The time in which the court may make a decision on the merits is open ended. As such, the procedure provided for in the Littleton adult entertainment establishment licensing ordinance does not guarantee a prompt judicial determination as required by *FW/PBS* and *Freedman*.

As the Supreme Court specifically stated in *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44, in the

absence of immediate judicial review "the state must instead allow a stay." *See, Baltimore Boulevard*, 58 F.3d at 1001 ["the County could avoid the constitutional problem engendered by its present scheme by permitting adult bookstores to operate until judicial determination is rendered . . . "]. *See also, Nightclubs, Inc.*, 202 F.3d, at 894. As discussed above, there is no assurance of prompt judicial participation to protect against the erroneous deprivation of First Amendment rights.

Under the challenged ordinance, there exists no guarantee that any adult business will operate while any judicial licensing proceedings are pending even before the trial court, nor is there any guarantee that any judicial review that might be available (either in the trial court or on direct appeal) "will be required in the shortest fixed period compatible with sound judicial resolution." *Freedman*, 380 U.S. at 39. Without such an express constitutional guarantee stated by this Court, trial courts (often unconsciously due to docket pressures) will be hard pressed to take action to disturb "the status quo of silence" imposed upon a business seeking government permission to present protected expression. *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. at 286. "Even if that [party] is willing and able to litigate the case successfully, the eventual relief may be 'too little and too late.'" *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S., at 758, *quoting Freedman*, 380 U.S. at 57.

"Swift judicial review is the remedy needed by those held back from speaking." *City News and Novelty, Inc. v. City of Waukesha*, 531 U.S. at 285. "Until a judicial decree to the contrary, the licensor's prohibition stands." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. at 758. In the absence of actual judicial determination, "delay

compels the speaker's silence." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. at 802. A constitutional requirement limiting the judicial review requirement of *FW/PBS* to prompt commencement of judicial proceedings does not satisfy "[t]he core policy underlying *Freedman* . . . , because undue delay results in the unconstitutional suppression of protected speech." *FW/PBS*, 493 U.S., at 228. As such, "the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J. concurring).

Under the procedures contained in the challenged ordinance, such judicial review could take years. In the absence of a guarantee of a swift judicial determination, the failure of the Littleton ordinance to provide a mandatory stay of enforcement or a provisional license pending review results in a system of prior restraint that fails to properly protect freedom of expression. This Court, in a long line of cases, has consistently required judicial involvement in any decisions relating to the licensing of protected speech due to the dangers inherent in such systems of government oversight of expression. As illustrated by the experience of the framers of the Constitution and continuing with voluminous litigation on this subject in the lower courts and this Court, governmental entities have been relentless in attempting to impose their will and drive out protected businesses through licensing systems to "protect" the community from controversial speech. This case presents yet another opportunity for the Court to require meaningful procedures to obviate the dangers of prior restraints on expression. Mere commencement of the process of judicial proceedings fails to provide "adequate bulwarks" to guard against this danger.

FW/PBS, 493 U.S., at 230 *quoting Bantam Books v. Sullivan*, 372 U.S. at 66. As in *Freedman* and *FW/PBS*, the Littleton licensing scheme fails to meet the standards required by the First Amendment.

II. THE TERMS "SUBSTANTIAL" AND "SIGNIFICANT" IN THE DEFINITION OF ADULT BOOKSTORE PERMIT LICENSING OFFICIALS TO EXERCISE OVERBROAD DISCRETION IN DETERMINING IF A BUSINESS REQUIRES A SPECIAL LICENSE TO PRESENT EXPRESSION AND RESULTS IN A CENSORSHIP SCHEME WITHOUT ANY EFFECTIVE AVENUE OF PROMPT JUDICIAL REVIEW TO CHALLENGE THE FINDING THAT A BUSINESS IS AN ADULT BOOKSTORE

While the criteria for granting a license have been held to provide objective standards, the requirement for a license itself involves the exercise of broad discretion by Littleton City officials. Section 3-14-2 of the Littleton Municipal Code defines "adult business" to include, *inter alia*, an adult bookstore, adult novelty store, or adult video store which devotes a "substantial or significant" portion of its stock-in-trade, floor space, or advertising costs to sexually explicit items or receives a significant or substantial portion of its revenues from such items.[5] (Pet. Br. App.,

[5] Littleton Municipal Code, Section 3-14-2 defines an "adult bookstore, adult novelty store, or adult video store" as:

> A commercial establishment which 1) devotes a significant or substantial portion of its stock-in-trade or interior floor space to; 2) receives a significant or substantial portion of its revenues from; or 3) devotes a significant or substantial

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at 13a-14a) The terms "significant or substantial," are not defined in the ordinance.[6] Thus, the City retains broad discretion to determine whether or not a business even needs to obtain a license to present protected expression.

The City repeatedly asserts that the Littleton ordinance is not a censorship ordinance because it involves only content neutral, non–discretionary criteria in determining whether or not a license to present protected expression should be granted or denied in the City of Littleton. However, this argument ignores the fact that the requirement of a license requires a discretionary determination by a city official of whether or not a "substantial or significant" portion of a business is devoted to defined adult material. In the instant case, Z.J. seeks to operate a

> portion of its advertising expenditures to the promotion of: the sale, rental or viewing (for any form of consideration) of books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, slides or other visual representations which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

The terms, "significant or substantial," and "characterized" are not defined in the ordinance.

[6] The Littleton ordinance's definition is far broader than the definition in the ordinance struck down in *FW/PBS* which defined "Adult Bookstore or Adult Video Store to be "a commercial establishment which as one of its principal business purposes offers for sale or rental" sexually explicit materials. *FW/PBS*, 493 U.S. 253-254, n. 5, (Scalia, J. dissenting). As noted by Justice Scalia, "the phrase 'as one of its principal business purposes' can connote that the material containing the specified depictions and descriptions does not merely account for a substantial proportion of sales volume but is also intentionally marketed *as material of that character*." *Id.*, at 260 (emphasis in original).

non-regulated adult business, but the City refuses to provide any guidance as to what differentiates a non-adult business from an adult business. As a result, Z.J. is effectively denied prompt judicial review because it is only entitled to such review if it applies for a license to operate an adult business, thereby admitting that it is, in fact, an adult business.

In the absence of any application to operate an adult business, the City official's determination that Z.J.'s business contains a "substantial or significant" amount of adult material is all that is required to impose the requirement of obtaining a license prior to sale of protected expression. Thus, in order to present a "substantial or significant" amount of adult expression in Littleton, Z.J. must submit to the subjective decision of the Littleton zoning official and the City clerk. Otherwise, Z.J. is deemed to be flouting the law if it disagrees with the determination of a City official. The only avenue for judicial review is filing a suit for violation of its civil rights or defending itself in civil or criminal proceedings. Z.J. has had to deal with all three while exposing itself and its officers to the potential of thousands of years of imprisonment and millions of dollars in fines.

Moreover, Z.J. was denied a sales tax license by Jon Payne because Denise Naegle determined Z.J. "could be categorized as an adult business." (R., p. 450-51) Failure to obtain a sales tax license is one of the non-discretionary grounds for denial of an adult entertainment establishment license. L.M.C., Section 3-14-8(A)(7) (Pet. Br. App., at 28a) Thus, the discretionary decision of whether an applicant carries a substantial or significant amount of adult material will result in denial of a sales tax license which in turn disqualifies the applicant from obtaining a license to

present protected expression. The fact that the discretion is one step removed from the adult entertainment license application process does not change the fact that the license may be used as a tool of censorship.

The difficulty of the use of terms like "substantial or significant" in creating substantive standards of conduct was forcefully driven home this term in the unanimous decision in *United States v. Banks*, 540 U.S. ___, 124 S.Ct. 521, Case No. 02-473 (Dec. 2, 2003). In *Banks*, this Court reversed a Ninth Circuit decision that a 15 to 20 second delay before a forcible entry and search of a residence violated the Fourth Amendment. The Court criticized the lower court's analysis that used the terms "significant" and "substantial" in determining the reasonableness of a suspicion of exigent circumstances. "Instructions couched in terms like 'significant amount of time' and 'an even more substantial amount of time,' 282 F.3d, at 704, *tell very little*." *Banks*, sl. op., p. 11, 124 S.Ct., at 528 (emphasis added).[7]

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[7] *United States v. Banks*, did not involve any First Amendment issues. However, the Court has consistently required judicial participation in the seizure of speech materials by insisting that search warrants list the items to be seized with "the most scrupulous exactitude." *Stanford v. Texas*, 379 U.S. 476, 485 (1965) *See also, New York v. P.J. Video*, 475 U.S. 868 (1986); *Roaden v. Kentucky*, 413 U.S. 496 (1973) ; *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979); *Heller v. New York*, 413 U.S. 483 (1973). Moreover, even a probable cause determination by a judge is not sufficient to remove allegedly obscene materials from circulation. *Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989); *Heller v. New York*, 413 U.S. 483 (1973); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964). The Court has held that wholesale seizures of speech materials constitute an unlawful prior restraint. *Fort Wayne Books*, 489 U.S. 46; *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Alexander v. United States*, 509 U.S. 544, 577 (1993) (Kennedy, J. dissenting).

In this case, the City has consistently refused or been unable to provide any guidance as to the meaning of these terms. Jon Payne, Senior Planning and Zoning Official for the City of Littleton, who had worked for the City since 1975, was completely unable to define the terms "substantial and significant" in the definition of adult bookstore. (R., at 460-461) Denise Naegle, Director of Community Development, defined the terms "substantial and significant" to mean "an important use in the business." (R., at 464) She could not place any percentage or number on this term. (R., at 464) Ms. Naegle "couldn't say" what percentage would not be a significant or substantial portion of its stock-in-trade or interior floor space and that "it would depend" on factors she was unable to articulate. (R, at p. 467, l. 9-24) However, based upon her interpretation she believed Z.J.'s business to be an adult entertainment establishment. (R., at 464)

However, in an area unrelated to controversial speech, Littleton has found a way to define the term "substantial" where cost "equals or exceeds 50%" in the context of describing damage or improvement to property in its flood plain and vested rights ordinances. *See*, L.M.C., Sections 10-6-2, 10-13-4. (Resp. Br. App., at 13-14)

In the opinion below, the Tenth Circuit suggested that a percentage figure would be a way to avoid vagueness issues. (Pet. App., at 13-14) Indeed, one of the *Amici* supporting the City in this case, the American Planning Association, produced a publication that actually makes a recommendation of a percentage figure that should be adopted by municipalities in establishing zoning

regulations for adult businesses.[8] The APA's well researched report recommended that the terms "substantial" and "significant" be quantified at 40 percent for floor space or inventory of a business in the definition of adult business.[9] (Resp. Br. App., at 15-16)

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[8] "*Amicus* American Planning Association (APA) is a non-profit public interest and research organization founded in 1978 to advance the art and science of planning – including physical, economic, and social planning – at the local, regional, state and national levels. The APA's mission is to encourage planning that will contribute to the public well-being by developing communities and environments that more effectively meet the present and future needs of people and society. The APA represents more than 30,000 professional planners, commissioners, and citizens involved with urban and planning issues." Brief of *Amici* National League of Cities, et al., "Interest of the *Amici Curiae*," p. 1.

Jon Payne, Planning Director from 1975-1995 and currently Littleton Senior Planner, testified he used the Planning Advisory Service of the American Planning Association as a research source. (R., p. 207, depo. p. 4, l. 23-24; R, p. 208, depo. p. 20, l. 17-23).

[9] The recommendation states, *"Quantify the terms 'a preponderance,' 'substantial,' or 'significant.'* Terms 'a preponderance,' 'substantial,' or 'significant' are open to interpretation. To use them in defining adult uses is to invite legal challenge. What is significant to the citizens of one community and their lawmakers may be 'insignificant' to others – most importantly, a court. . . . Therefore we, recommend a dual threshold for identification of sex businesses – inventory and floor area. In this report, we have used a measure of 40 percent of inventory items and 40 percent of floor area open to the general; stores exceeding either of those thresholds as regards the presence of sexually oriented materials are treated as sex businesses. . . ."

Kelly and Cooper, *"everything you always wanted to know about regulating sex businesses,"* APA Planning Advisory Service, Report Number 495/496, December 2000, pp. 156-157. (emphasis in original) (the full text of this recommendation is attached to this Brief at App. 15-16) The recommendation went on to discuss the merits of defining these terms at 30% or 50%.

Thus, under the American Planning Association's own recommendation, the Littleton ordinance is subject to interpretation. Contrary to the testimony of city officials, the definition of the terms "substantial" and "significant" are not only subject to an objective definition by a percentage, but this is the recommended approach according to the publication of the City's *amicus*, the APA.

The terms defining adult entertainment establishment "tell very little" to licensing officials or anyone who wishes to operate a bookstore in Littleton on how to comply with the licensing ordinance. Z.J. has always contended it does not seek to be an "adult bookstore, adult novelty store or adult video store," and, in fact, is not such a business subject to the licensing requirement. It has reduced its inventory to attempt to comply with the City's mysterious standard. (Plaintiff-Appellant's Supplemental Brief, Tenth Circuit, Exhibit C, p. 64, l. 3-4)

The City asserts that all prior restraint cases addressing overbroad discretion only relate to the grounds for granting or denying a license to present protected expression, and not to "the determination of whether a regulation *applies* to a particular business." (Pet. Br. App., at 28a, emphasis in original) However, this distinction has no substance. This Court has demonstrated it will "look through forms to the substance to recognize that informal censorship may sufficiently inhibit the circulation of publications" to constitute a prior restraint. *Bantam Books v. Sullivan*, 372 U.S., at 67. Here, the dangers of delay suppressing expression are, in fact, more pronounced because the discretionary decision of the city official that a license is required or not is essentially unreviewable since there is not even a denial to appeal.

This Court, in *Forsyth County v. Nationalist Movement*, 505 U.S. 123, at 130-131 (1992), explained the dangers of allowing broad discretion to licensing officials.

> A government regulation that allows arbitrary application is "inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981). To curtail that risk, "a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license" must contain "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth*, 394 U.S., at 150-151. See also *Niemotko [v. Maryland]*, 340 U.S. 268, at 271 (1951). The reasoning is simple: If the permit scheme "involves the appraisal of facts, the exercise of judgment, and the formation of an opinion," *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940), by the licensing authority, "the danger of censorship and of abridgement of our precious First Amendment freedoms is too great" to be permitted. *Southeastern Promotions v. Conrad*, 420 U.S. 546, 553 (1975).

The determination of whether Z.J. devotes a substantial or significant amount of its stock-in-trade or floor space to adult materials "involves the appraisal of facts, the exercise of judgment, and the formation of an opinion." *Id.* The testimony of Denise Naegle makes this clear:

> Q. What percentage would not be a significant or substantial portion of its stock in trade or interior floor space?
>
> A. I couldn't say. It would depend.

Q. What would it depend on?

A. You know, I am not certain. I would have to think about it and do some research. I would probably want to know volume of sales and things like that. But I don't know. I can't say for certain.

(R., at p. 467, l. 9-17)

The deposition testimony of Jon Payne is even less illuminating. (R., at p. 460, l. 20 – p. 461, l. 2)

Given this testimony from the city officials making decisions on whether a license is required, the danger of suppression of unpopular speech is great, and anything but "vanishingly slight" as asserted by the *Amici* Ohio. (Br. of Ohio, p. 13)

The Court has consistently required that objective standards control licensing decisions so that the process is transparent and can be effectively reviewed by a court.

> "Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting favorable, and suppressing unfavorable expression."

City of Lakewood, 486 U.S. at 758.

Here, the Littleton definitions provide no guideposts, nor do city officials even attempt to offer any guideposts to assist a business seeking to comply with the ordinance or

to a court reviewing licensing decisions to determine if the licensor is suppressing a particular point of view. This case offers a clear example of how a supposedly "content neutral" licensing ordinance may be used as a means to suppress disfavored speech and the wisdom of the essential *Freedman* safeguards of prompt action by decisionmakers and reviewing courts. The challenged Littleton adult entertainment establishment licensing ordinance fails to provide the proper safeguards to ensure speech is not irretrievably lost.

The City asserts in its Brief, p. 27-28, that Z.J. never previously raised the issue of overbroad discretion in this case. This is simply incorrect. Z.J. brought a broad challenge to a very lengthy ordinance (Pet. Br. App., at 12a-42a) that challenged the Littleton adult entertainment establishment ordinance's zoning, licensing, civil disability, age restrictions, and other provisions on numerous grounds. The issue of improper discretion in the licensing law and vagueness in the zoning law were issues litigated in the district court and the Tenth Circuit. Overbroad discretion and the vagueness of definitions was raised in the complaint (R., at pp. 13-19) and in the cross-motion for summary judgment (R., at pp. 395-397, 411-419), as well as the appellate briefs. (Opening Brief of Plaintiff-Appellant, pp. 26-28, 44-53) The problems inherent in the definitional terms were part of the argument on overbroad discretion in licensing decisions.[10] The City's assertion that this argument was not raised is not supported by the record.

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[10] "It is Plaintiff's position that the challenged licensing scheme violates the First and Fourteenth Amendments because the licensing official has impermissibly broad discretion to grant, deny, suspend or

(Continued on following page)

III. UNLIKE THE CONTENT NEUTRAL ORDINANCE UPHELD IN *THOMAS v. CHICAGO PARK DISTRICT*, 534 U.S. 316 (2002), THE LITTLETON ORDINANCE TARGETS BUSINESSES ON THE BASIS OF THE CONTENT OF THE SPEECH PURVEYED

The City repeatedly asserts that the licensing ordinance in this case should be evaluated as a content neutral time, place and manner restriction and goes so far as to say this is "well settled." (Pet. Br. App., at 31a) However, the Court in *FW/PBS* specifically declined to rule on this issue because it had invalidated the Dallas licensing ordinance under a prior restraint analysis.[11]

Contrary to the assertions of the City, the Littleton ordinance, imposing additional requirements (including but not limited to licensing) on businesses disseminating sexually explicit publications and films, by its own terms, necessarily regulates a business on the basis of the content of the speech it presents. The City's repeated invocation of the term "content neutral" overlooks the Court's two most recent pronouncements on this issue.

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revoke a license to operate an adult entertainment establishment. Moreover, the impermissibly broad discretion vested in the City Clerk is exacerbated by the broad language in the licensing Ordinance, which fails to provide ascertainable standards for application and enforcement of the Ordinance." (Z.J. Brief in Support of Motion for Partial Summary Judgment, p. 23) (R., at 395)

[11] "Because we conclude that the city's licensing scheme lacks adequate procedural safeguards, we do not reach the issue decided by the Court of Appeals whether the ordinance is properly viewed as a content-neutral time, place, and manner restriction aimed at secondary effects arising out of the sexually oriented business." *FW/PBS*, 493 U.S., at 223 (O'Connor, J., plurality op.).

In the unanimous opinion in *Thomas v. Chicago Park District*, 534 U.S. 316, 322, and n. 2, the Court distinguished the ordinance struck down in *FW/PBS* from "a content neutral permit scheme regulating speech in a public forum" since "it involved a licensing scheme that targets businesses purveying sexually explicit speech." *Id.* *See also, City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425, 448 (2002) (Kennedy, J., concurring in the judgment) (*Thomas* "suggest[ed] that a licensing scheme targeting only those businesses purveying sexually explicit speech is not content neutral.").

In *City of Los Angeles v. Alameda Books, Inc.* 535 U.S. 425, both Justice Kennedy's opinion concurring in the judgment and Justice Souter's dissenting opinion discussed the concept of "content neutrality" in some detail. Justice Kennedy's opinion initially noted "that the designation ["content neutral"] is imprecise," *Id.*, at 444-445. Later, the opinion stated more explicitly, "[t]hese [adult use zoning] ordinances are content based and we should call them so." *Id.*, at 448. Nevertheless, this opinion endorsed the use of intermediate scrutiny for content based land use regulations where "negative externalities are diminished but speech is not." *Id.*, at 446.

> [Zoning regulations] do not automatically raise the specter of impermissible content discrimination, even if they are content based, because they have a *prima facie* legitimate purpose: to limit externalities of land use. As a matter of common experience, these sorts of ordinances are more like a zoning restriction on slaughterhouses and less like a tax on unpopular newspapers. The zoning context provides a built in legitimate

> rationale, which rebuts the usual presumption that content-based restrictions are unconstitutional.

Id., at 449.

Justice Souter's dissenting opinion recognized that an adult business "is clearly burdened only if its expressive products have adult content." Such adult zoning regulations "occupy a kind of limbo between full blown, content based restrictions and regulations that apply without any reference to the substance of what is said." *Id.*, at 457. "A restriction on adult content is thus also a restriction turning on a particular viewpoint, of which the government may disapprove." *Id.* The capacity of zoning regulation to address the adverse external secondary effects of adult uses without eliminating speech is "the only possible excuse for speaking of secondary–effects zoning as akin to time, place or manner regulations." *Id.*

That excuse does not exist with regard to the Littleton ordinance that imposes a licensing requirement on adult businesses, in addition to a strict zoning restriction that limits such businesses to locations to maximum possible area of 78 acres, less than 1% of the Littleton's total area, as determined by the Tenth Circuit. (Pet. App., at 36-37) Like the ordinance struck down in *FW/PBS*, the Littleton licensing ordinance can be distinguished from content neutral licensing laws because it "targets businesses purveying sexually explicit speech." *Thomas*, 534 U.S., at 322, n. 2. As such, the City's pleas that the licensing ordinance be evaluated as a content neutral time, place and manner restriction under an intermediate level of scrutiny should be rejected.

Finally, the City contends that the ordinance should be considered content neutral because it is "narrowly tailored to affect only the category of theaters shown to produce the unwanted secondary effects" as required by *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, at 52 (1986) This argument is contradicted by the inability of city officials to articulate coherently a basis for determining which types of businesses are regulated and which are not subject to the licensing requirement, *See* discussion *supra.* In fact, Z.J. does not provide viewing of films or live entertainment on the premises. *See, Encore Videos, Inc. v. City of San Antonio*, 352 F.3d 938 (5th Cir. 1993), *clarifying prev. op.*, 330 F.3d 288 (5th Cir. 2003), *cert. denied*, ___ U.S. ___, 124 S.Ct. 466 (2003) (application of adult zoning ordinance to video store "found not to be narrowly tailored because of both its failure to make an on-site/off-site distinction and its low 20% inventory requirement.") The broad sweep of the encompassing definitions of adult businesses, confirmed by the testimony of city officials, indicates the Littleton ordinance is not narrowly tailored.

The challenged ordinance requires prior approval before expression can occur. Wrongful denial or any delay in the issuance of a license by city officials results in the prohibition of certain types of expression in the City of Littleton. As such, the only appropriate analytical framework with regard to the issue before the Court is under a prior restraint analysis.

IV. THE CITY INCORRECTLY ASSERTS THAT IT IS "UNWORKABLE" TO PROVIDE THE CONSTITUTIONALLY REQUIRED SAFEGUARDS TO PROTECT EXPRESSION

The City argues that it is "unwor[illegible]able" to guarantee a prompt judicial determination and that applying this essential *Freedman* safeguard will cause a sea change in the law. The City apparently is not as creative in protecting speech as it is restricting speech to limit the alleged adverse secondary effects of unpopular speech. Indeed, the City's *amici* suggest provisional licenses or time periods for prompt judicial determination as methods to provide for prompt judicial determination. As demonstrated by the fact that several circuits have required prompt judicial determination, many jurisdictions have dealt with the issue of prompt judicial review by enacting statutes or providing for provisional licenses. Neither the City nor *amici* provide any concrete examples of problems caused by compliance with the essential safeguard of prompt judicial review.

The State of California has enacted a statute that specifically deals with the issue of prompt judicial determination. Cal. Code of Civil Procedure, Section 1094.8 ("Permit proceedings affecting expressive conduct; expedited judicial review") (*See* Response to Appellee's Petition for Rehearing En Banc filed in the Tenth Circuit by Z.J., Exhibit A.) *See also*, Tenn. Code Ann. Section 7-51-1110(d) (providing for prompt review); and *Baby Tam v. City of Las Vegas*, 199 F.3d 1111 (9th Cir. 2000) (Nevada Revised Statutes and local court rules amended to provide for prompt judicial determination of prior restraint claims). Aurora, Colorado has enacted an ordinance to expressly address prompt judicial determination in light of the

Tenth Circuit's decision in this case. *See*, Aurora Municipal Code Section 86-55(d). (Response to Appellee's Petition for Rehearing En Banc filed in the Tenth Circuit by Z.J., Exhibit B)

Thus, contrary to the protests of the City, it is *not* impossible, or even particularly difficult to meet constitutional requirements to protect against the suppression of expression. That is not a proper reason to diminish First Amendment protection. As stated by the Court, "we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency." *Riley*, 487 U.S., at 295.

Moreover, the Tenth Circuit upheld many provisions of the Littleton ordinances that address the adverse secondary effects of adult entertainment establishments. The most important of these is the locational restriction that banishes such businesses to less than 1% of the total land area of Littleton within limited areas in industrial zoned areas. Even without a licensing requirement, the City of Littleton has numerous tools with which to regulate these businesses. The City can also enforce laws of general application against any business, including bookstores, selling any type of material, and obtain a closure in the case of violations of Littleton health and safety regulations.

In addition, the City remains free to enforce any criminal laws in the event that actual crimes occur in or around such businesses, and close such businesses if they constitute a public nuisance. *See*, *Arcara v. Cloud Books, Inc.* 478 U.S. 697 (1986). "If, however, a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived

secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Arcara v. Cloud Books, Inc.* 478 U.S. at 708 (O'Connor, J. concurring).

This Court in *Freedman* and *FW/PBS* imposed important requirements upon municipalities attempting to regulate businesses engaged in certain types of speech through the use of licenses. The City is now trying to neutralize the essential second *Freedman* safeguard requiring prompt judicial determination to apparently assist it in combating the adverse external secondary effects of adult entertainment establishments. The City has apparently chosen not to enforce laws applicable to all businesses in favor of a licensing scheme targeting businesses distributing adult materials. However, "[t]he 'starch' in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government." *United States v. Playboy Enterprises Group*, 529 U.S. 803, at 830 (2000) (Thomas, J. concurring), *citing Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 774 (1996) (Souter, J. concurring) ("Reviewing speech regulations under fairly strict categorical rules keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said.")

These requirements should not be brushed aside because it is inconvenient for the government to comply with the constitutional requirement of ensuring that protected speech is not erroneously restrained. The Tenth

Circuit's decision in this case faithfully applies the decisions of this Court and protects the rights guaranteed to all citizens by the First and Fourteenth Amendments to the United States Constitution. The Tenth Circuit decision should be affirmed.

CONCLUSION

Based upon the foregoing arguments and authorities, Respondent Z.J. Gifts respectfully requests the Court affirm the decision of the United States Court of Appeals for the Tenth Circuit holding that the prompt judicial review requirement of *Freedman* and *FW/PBS* entails prompt judicial determination, and not merely a prompt commencement of judicial proceedings.

Dated: January 26, 2004

Respectfully submitted,

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DISTRICT COURT, ARAPAHOE COUNTY, COLORADO Court Address: Arapahoe County District Court 7325 S. Potomac Street Englewood, Colorado 80112	
Plaintiff: CITY OF LITTLETON Defendant: Z.J. GIFTS D-4, LLC, a Colorado Limited, Liability Company d/b/a CHRISTAL'S	•COURT USE ONLY• Case Number: 00CV162 Div.: 3 Ctrm:
ORDER	

THIS MATTER, having come on to be heard on Defendant's Motion for a Stay Pending Appeal pursuant to C.R.C.P. 62(d) and C.A.R. 8(a).

THE COURT having reviewed Defendant's Motion, the City's Response and hearing Oral Argument on December 14, 2001,

DOTH ORDER that the Defendant's Motion for a Stay Pending Appeal be denied.

DATED this 27th day of December, 2001 nunc pro tunc to the 14th day of December, 2001.

BY THE COURT

/s/ Thomas C. Levi
Thomas C. Levi
District Court Judge

COLORADO COURT OF APPEALS

Court of Appeals No. 01CA2319
Arapahoe County District Court No. 00CV0162
Honorable Thomas C. Levi, Judge

City of Littleton,

Plaintiff-Appellee,

v.

Z.J. Gifts, D-4 LLC,

Defendant-Appellant.

ORDER AND JUDGMENT REVERSED AND CASE REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE ROTHENBERG
Kapelke and Dailey, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
February 20, 2003

Larry W. Berkowitz, City Attorney, Brad D. Bailey, Assistant City Attorney, Littleton, Colorado, for Plaintiff-Appellee

Schwartz & Goldberg, P.C., Arthur M. Schwartz, Michael W. Gross, Denver, Colorado, for Defendant-Appellant

In this action to enforce a municipal zoning and adult business licensing ordinance, defendant, ZJ Gifts, D-4 LLC, doing business as Christal's, appeals the trial court's judgment in favor of plaintiff, City of Littleton, and the

corresponding injunction order. We reverse and remand for further proceedings.

I. Background

A. Federal Court Action

In 1999, before this action was filed, ZJ Gifts initiated an action in the federal district court seeking declaratory relief and damages against the City. ZJ Gifts challenged the constitutionality of the Littleton City Code adult business regulations based on alleged violations of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution, and article II, sections 3, 10, and 25 of the Colorado Constitution.

In March 2001, the federal district court issued an order declaring Littleton's adult business regulation ordinance constitutional in its entirety, granting the City's motion for summary judgment, and dismissing the case. *Z.J. Gifts D-4, L.L.C. v. City of Littleton,* (D. Colo. No. 99-N-1696, Mar. 31, 2001) *(ZJ Gifts I).*

In November 2002, the United States Court of Appeals for the Tenth Circuit affirmed the district court judgment in part and reversed it in part. The federal appellate court upheld the federal district court's ruling as to the constitutionality of the location and zoning provisions of the Littleton ordinance, but reversed the ruling regarding the constitutionality of certain other provisions. *Z.J. Gifts D-4, L.L.C. v. City of Littleton,* 311 F.3d 1220 (10th Cir. 2002) (*ZJ Gifts II*).

The federal appellate court concluded: (1) ZJ Gifts had no standing to challenge the ordinance on vagueness grounds; (2) ZJ Gifts had standing to challenge the

application procedure, location requirements, and judicial review procedure; (3) the ordinance constituted a prior restraint; (4) the ordinance's requirements that zoning officials provide a letter to accompany an adult business license application and that the police department fingerprint and photograph the applicant were unconstitutional because they did not specify a time within which these government officials must act; (5) the ordinance's judicial review procedure was unconstitutional because it failed to provide for prompt judicial review; and (6) the constitutionally infirm provisions were severable from the remainder of the licensing scheme. *ZJ Gifts II*.

Both ZJ Gifts and the City petitioned for rehearing, which was denied.

B. State Court Action

In January 2000, while the federal action was still pending, the City filed this action for damages and an injunction to enjoin ZJ Gifts from operating its business "in a manner inconsistent with the provisions of the Littleton City Code." The City alleged that ZJ Gifts was an adult business operating outside of the permitted zoning district, within five hundred feet of a church or day care center, and without the licenses required for a retail and adult business.

In its answer, ZJ Gifts admitted that its store was located in a zone that prohibited adult businesses, but denied that it operated an adult business. ZJ Gifts also contended the provisions of the Littleton adult business regulations were unconstitutionally vague, overbroad, and violative of the First and Fourteenth Amendments to the United States Constitution, and article II, section 10 of the

Colorado Constitution. ZJ Gifts did not challenge the constitutionality of the general retail licensing provision.

The parties filed cross-motions for summary judgment and briefed the issues. However, before the trial court had ruled, the City filed a second motion for summary judgment, asserting that the issues had been decided adversely to ZJ Gifts by the federal district court and that collateral estoppel now barred relitigation of the issues in this case.

In August 2001, the trial court granted the City's second motion for summary judgment and enjoined ZJ Gifts from operating its business in violation of the Littleton City Code.

II. Standard of Review

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits show that no genuine issue as to any material fact exists and that the movant is entitled to judgment as a matter of law. C.R.C.P. 56(c); *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78 (Colo. 1999).

In determining whether summary judgment is proper, the court must give the nonmoving party the benefit of all favorable inferences that may be reasonably drawn from the undisputed facts. All doubts must be resolved against the moving party. *Pham v. State Farm Mut. Auto. Ins. Co.*, ___ P.3d ___ (Colo. App. No. 01CA1965, Jan. 2, 2003).

We review an order granting summary judgment de novo. Where the material facts in a case are not in dispute, we can resolve an appeal as a matter of law. *Pham v. State Farm Mut. Auto. Ins. Co., supra.*

III. Collateral Estoppel

ZJ Gifts contends the trial court erred by granting summary judgment in favor of the City based on the doctrine of collateral estoppel. ZJ Gifts maintains that collateral estoppel should not have applied because the federal district court order was subject to de novo review and therefore not final. We conclude the issue before us is now moot because the ruling of the federal appellate court is now final.

A.

Before we address the merits of ZJ Gift's collateral estoppel argument, we first reject the City's contention that the invited error doctrine precludes ZJ Gifts' appeal. According to the City, ZJ Gifts failed to raise in the trial court the argument it makes on appeal, namely, that for the purposes of collateral estoppel, a decision that must be reviewed de novo is not final pending appeal. We disagree that the invited error doctrine applies.

The invited error doctrine provides that a party who has injected error into the case may not later complain on appeal. *Hansen v. State Farm Mut. Auto. Ins. Co.,* 957 P.2d 1380 (Colo. 1998) (party who actively participated in the jury instruction conference, but chose not to redraft an instruction to comport with the law, was precluded from appealing based on an erroneous instruction).

Contrary to the City's contention, the circumstances in *Morgan County Department of Social Services v. J.A.C.,* 791 P.2d 1157 (Colo. App. 1989), are distinguishable. There, the respondent's counsel agreed to the manner in which peremptory challenges would be allocated, but later changed his position. After the jury returned its verdict,

respondent's counsel moved for a new trial, alleging an unlawful peremptory challenge allocation. For the first time, he cited legal authority supporting his position.

The trial court denied the motion for a new trial, after finding counsel "knew of but did not cite" the legal authority that would have allowed the court to avoid error. That ruling was upheld on appeal after counsel admitted at oral argument that he was aware of the legal authority when he made his objection, but failed to inform the trial court. *Morgan County Dep't of Soc. Servs. v. J.A.C., supra,* 791 P.2d at 1159.

Unlike the circumstances in J.A.C., the record here contains no indication that counsel for ZJ Gifts was aware of, but failed to cite, legal authority regarding the finality of a summary judgment pending appeal.

We therefore reject the City's argument that the failure of ZJ Gifts' counsel to argue this point of law in response to the City's motion for summary judgment injected error into the proceedings.

B.

The doctrine of collateral estoppel provides that a court's final decision on an issue actually litigated and decided is conclusive of that issue in any subsequent suite. The doctrine protects litigants from the burden of relitigating the same issue and promotes judicial economy by preventing needless litigation. *Carpenter v. Young,* 773 P.2d 561 (Colo. 1989).

Collateral estoppel has four requirements. Only the fourth requirement of finality is at issue in this case.

The first requirement is that the issue precluded must be identical to an issue actually determined in a prior proceeding. The second is that the party against whom estoppel is asserted must have been a party to the prior proceeding. The third is that the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Bebo Constr. Co. v. Mattox & O'Brien, P.C., supra; Quist v. Specialties Supply Co.,* 12 P.3d 863 (Colo. App. 2000).

The fourth requirement is that there must be a final judgment on the merits in the prior proceeding. *Bebo Constr. Co. v. Mattox & O'Brien, P.C., supra.* The judgment must be "sufficiently firm" such that it was not tentative, the parties had an opportunity to be heard, and there was an opportunity for review. *Carpenter v. Young, supra,* 773 P.2d at 568.

While an issue decided on a motion for summary judgment may bar relitigation of that issue based on collateral estoppel principles, *Bebo Constr. Co. v. Mattox & O'Brien, P.C., supra,* the pendency of a de novo review proceeding suspends the operation of an otherwise final judgment. *See Indus. Comm'n v. Moffat County Sch. Dist. RE No. 1,* 732 P.2d 616 (Colo. 1987); *Jefferson County Sch. Dist. No. R-1 v. Industrial Com'n,* 698 P.2d 1350 (Colo. App. 1984), *overruled on other grounds by Indus. Comm'n v. Moffat County Sch. Dist. RE No. 1, supra; Miller v. Lunnon,* 703 P.2d 640 (Colo. App. 1985) (citing with approval Restatement (Second) of Judgments § 13 cmt. f (1982), that a judgment otherwise final remains so despite the taking of an appeal unless the appeal is actually a review de novo).

C.

Here, in its second motion for summary judgment, the City maintained that all disputed issues in the state court action had been decided by the federal district court. The trial court agreed, and based on the City's submissions from the federal district court case, the court granted the City's motion for summary judgment.

However, at the time the trial court did so, ZJ Gifts had appealed the summary judgment entered by the federal district court, and the federal appellate court had not yet ruled. Accordingly, the federal district court's summary judgment did not meet the finality requirement of collateral estoppel, *see Carpenter v. Young, supra,* and the trial court here erred in concluding collateral estoppel applied.

However, during oral argument before this court, both sides agreed that the federal appellate court has now completed its review of the prior judgment and has denied the parties' respective petitions for rehearing. To the extent that material facts are not in dispute, we are arguably in the same position as the trial court to resolve the issues in the City's motion for summary judgment. *See Pham v. State Farm Mut. Auto. Ins. Co., supra.*

Nevertheless, we conclude the merits of the underlying issues should be decided by the trial court on remand. The federal appellate court affirmed in part and reversed in part the federal district court's judgment, and ZJ Gifts also maintains that the issues decided in the federal proceeding were not identical to those in the state proceeding. The parties do not appear to have litigated in the federal proceeding the City's claim for relief based on ZJ Gifts' alleged violation of the Littleton sales tax license

requirement. And, beyond acknowledging the fact that ZJ Gifts did not possess a sales tax license, the federal district court did not enter any findings of fact or conclusions of law regarding the sales tax license requirement relevant to the disposition of the issue here. There was no relevant discussion of that issue on appeal. *See ZJ Gifts I; see also ZJ Gifts II.*

Further, the parties have not briefed the underlying issues on appeal, which is significant in light of the number of recent opinions issued nationwide that may bear on the issues, and the City also has amended certain provisions of the ordinance.

We therefore reverse the order granting summary judgment and remand the case to the trial court to resolve these issues.

IV. Injunction

However, we address ZJ Gifts' contention that the trial court's injunction is unenforceable because it is vague and does not conform to the specificity requirement of C.R.C.P. 65(d). We agree.

C.R.C.P. 65(d) provides that every order granting an injunction "shall set forth the reasons for its issuance; shall be specific in its terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained."

A trial court has broad discretion to formulate the terms of injunctive relief when equity so requires. *Colo. Springs Bd. of Realtors, Inc. v. State,* 780 P.2d 494 (Colo. 1989). However, an injunction prohibiting conduct must be sufficiently precise to enable the party subject to it to

conform its conduct to the requirements thereof. *Colo. Springs Bd. of Realtors, Inc. v. State, supra,* 780 P.2d at 499 (holding injunction vague and remanding to modify injunction to inform enjoined party of the "steps it must take to avoid violations thereof").

When interpreting a state procedural rule, we make look to the similar federal rule and related case law for guidance. *Allen v. Am. Family Mut. Ins. Co.,* ___ P.3d ___ (Colo. App. No. 01CA0317, Sept. 26, 2002).

One purpose of Fed. R. Civ. P. 65 is to ensure that those against whom an injunction is issued receive fair and precisely drawn notice of what the injunction actually prohibits. Fed. R. Civ. P. 65 is also intended to avoid contempt citations based on an order that is too broad or vague. *United States v. Louisiana-Pacific Corp.,* 682 F. Supp. 1141 (D. Colo. 1988).

An order requiring a party to obey the law in the future is too broad under Fed. R. Civ. P. 65, as is an order enjoining a party from further violations of a particular law, because such orders fail to meet the specificity requirements of the rule. *United States v. Louisiana-Pacific Corp., supra.*

Here, the injunctive order of the trial court reads in full: "This court further orders that the Defendant be enjoined from operating its business in violation of the Littleton City Code." The order does not set forth the reasons for its issuance and does not describe the acts or acts from which ZJ Gifts is restrained. Also, there are no findings regarding the provisions, if any, of the Littleton City Code that ZJ Gifts violated.

Because the order's language does not provide fair and precisely drawn notice of what it prohibits, we conclude it does not meet the requirements of C.R.C.P. 65(d).

The order and judgment are reversed, and the case is remanded for further proceedings in accordance with the views expressed in this opinion.

JUDGE KAPELKE and JUDGE DAILEY concur.

Littleton Municipal code

Chapter 6, Flood Plain Regulations

10-6-2: DEFINITIONS:

Unless specifically defined below or elsewhere in this Code, words or phrases used in these regulations shall be interpreted to have the same meaning as in common usage, and to provide reasonable application of these regulations.

SUBSTANTIAL DAMAGE: Damage, of any origin, sustained by a structure which results in costs to restore the structure to its origin [sic] condition that equal or exceed fifty percent (50%) of the market value of the structure before the damage occurred.

SUBSTANTIAL IMPROVEMENT: Any repair, reconstruction, or improvement to a structure, the cost of which equals or exceeds fifty percent (50%) of the market value of the structure either: a) before the improvement or repair is started; or b) if the structure has been damaged and is being restored, before the damage occurred. For the purpose of this definition, "substantial improvement" is considered to occur when the first alteration of any wall, ceiling, floor, or other structural part of the building commences, whether or not that alteration affects the external dimensions of the structure. "Substantial improvement" does not include either: 1) any construction necessary to comply with existing state or local health, sanitary, or safety code specifications which are solely necessary to assure safe living conditions, or 2) any alteration of any officially designated historic structure.

Littleton Municipal code

Chapter 13, Vested Property Rights

10-13-4: DEFINITIONS:

All words used in this Chapter, except where specifically defined herein, shall carry their customary meanings when not inconsistent with the context. Definitions contained elsewhere in this City Code shall apply to this Chapter unless modified hereinbelow.

SUBSTANTIAL IMPROVEMENT: Any repair, reconstruction, redevelopment, improvement or addition to an existing structure (or structures), the cost of which equals or exceeds fifty percent (50%) of the actual value (County Assessor's calculations) of said structure either: a) before the improvement is started; or b) if the structure has been damaged and is being restored, before the damage occurred.

Excerpt from Kelly and Cooper, "everything you always wanted to know about regulating sex businesses", American Planning Association, Planning Advisory Service, Report Number 495/496, December 2000, Chapter 9, Recommendations, pp. 156-157.

RETAIL BUSINESSES

Quantify the terms "a preponderance," "substantial," or "significant." The terms "a preponderance," "substantial" or "significant" are open to interpretation. To use them in defining adult uses is to invite legal challenge. What is "significant" to the citizens of one community and their lawmakers may be "insignificant" to others – most importantly, a court. The retail value of the materials in stock might be the best measure as to whether a business was really a sex business, but most local governments are not equipped to do full retail inventory audits. Therefore, we recommend a dual threshold for identification of sex businesses – inventory and floor area. In this report, we have used a measure of 40 percent of inventory items and 40 percent of floor area open to the general public; stores exceeding *either* of those thresholds as regards the presence of sexually oriented materials are treated as sex businesses. The exact percentage can vary and need not be the same percentage for floor area as for inventory. The important message is the use of the percentage and the use of two different measures, making it more difficult for a business that specializes in sex to be classified as a business that does not.

Some local governments might effectively use 30 percent as the threshold. We think that using a threshold of less than 30 percent leaves the community open to the

argument that the amount of area or inventory devoted to sexually oriented materials is not "significant." Likewise, we would not recommend the use of 50 percent because there is too much room for error on either side of that mark to make it perfectly clear whether a business is or is not a business dealing primarily in sexually oriented materials.